

A Precarious Balance

Collections Access and Intellectual Property Rights

In the 20th century, museum staff talked of balancing collections access against preservation concerns. At the cusp of the 21st century, museum staff are rapidly discovering that the ability to balance collections access against the risks of intellectual property rights lawsuits is a survival skill of equal importance. Such concerns are not new. Since the founding of our nation, U.S. lawmakers have been trying to solve the problem of how to strike a balance between two groups,¹ including:

- democratic society's need to have rapid and unlimited access to creative works and inventions to inspire other potential creators, and as key resources for public betterment in the arts and sciences, education, news reporting, and criticism²
- creators' (artists, authors, and inventors) needs to control how their works are used and make a profitable living from their works

Lawmakers and the courts adopted intellectual property rights (IPR) legislation (and the supporting IPR case law) as the most effective way to balance the competing needs of creators and the public. Museum staff face intellectual property rights issues in almost every aspect of daily life.³

What is protected by intellectual property rights?

While facts, ideas, and principles can't be protected, intellectual property rights protect:

- original creative works in fixed form through the use of copyrights,
- designs, materials, processes, and inventions through the use of patents, and
- a manufacturer's products and services through the use of trade names and marks.⁴

Note: Naturally occurring scientific specimens, archeological artifacts, raw data, and natural and physical processes have no intellectual property rights protections.

Creators of intellectual property—who may be architects, artists, authors, inventors, manufacturers, museum staff, sculptors, writers, or others—may sell, license, or transfer intellectual property rights

to others, including museums.⁵ Creators may sell individual rights or all rights. Museums, like libraries and archives, often own works without owning the work's intellectual property rights.⁶ For the museum to own or lease the intellectual property rights, the rights owner (usually the creator of the work or the creator's heirs if the creator is dead) must either transfer the rights in writing or license usage of them to the museum.⁷ Check transmittal documents, such as a Deed of Gift, to see if the museum received the appropriate rights.⁸ Museums that lack intellectual property rights to their collections are limited in how they may use their collections. When museums lack rights, each potential usage must be analyzed for potential legal risks.

Intellectual property rights are governed by a wide range of legislation, some of which forms part of our most basic legislation, the U.S. Constitution.⁹

What are intellectual property rights?

Copyrights (Copyright Act of 1976, 17 USC 101-810 et seq. [1988 & Supp. V 1993]; Sonny Bono Term Extension Act of 1998 [PL 105-298, 112 Stat. 2827]; and the Digital Millennium Copyright Act [PL 105-304, 112 Stat. 2860]) allow creators the right to exclusively benefit from their work (currently for their lifetime plus 70 years), while protecting and defining acceptable usage by all other individuals and organizations.

Under copyright law, the creator holds all rights to copy or reproduce, distribute or publish, exhibit or display, publicly perform, change (alter) the work, or produce derivative works (spin-off products such as posters or T-shirts).

In addition under the Visual Artist's Rights Act artists have "moral rights" for fine art works created after June 1, 1991, including the rights to have:

- their works attributed correctly and no works that aren't their own wrongly attributed to them,
- their work maintained without alteration, **and**
- their works protected from destruction during the artist's lifetime.¹⁰

"Fair use" is a special exemption to copyright protection, which allows use of materials if the usage fits four criteria:

- The usage is of small and insignificant portions of the work (but not the most significant portion of the work or the bulk of the work).

- The usage is for “transformative” purposes such as commentary, criticism, news reporting, parody, scholarship, and teaching (but not for public distribution, exhibition, derivative works, adaptations, public performance, or for profit purposes).
- The usage doesn’t affect the market for the work (for example, the usage is not-for-profit and no money changes hands).
- The nature of the work is not dramatic or fictional, but rather factual or conceptual.¹¹

If a museum makes “fair use” of copyright-protected materials, permission of the work’s creator isn’t necessary.¹² However “fair usages” must be justifiable according to the four criteria listed above.¹³ **Note:** Museum staff may always copy unprotected materials (such as facts, ideas, and concepts); works with little creative authorship (such as slogans); works whose copyright protections have lapsed (such as works published before 1923), or works that never had protected status due to their circumstances of creation (such as works by federal employees).

Patents (U.S. Constitution Article I, Section 8 and 35 U.S.C. 1 et seq.) are authorizations granted by the federal government to inventors and/or their employers to exclusively produce, sell, or use their inventions (usually designs, machines, or processes) within the United States for 14 years (design patent) or 20 years (utility patent) from the date of filing a patent application. Patents prohibit other individuals from making, using, selling, or offering for sale protected patented items in the U.S., including museums making reproductions. Inventors may patent designs, machines, manufacturing methods, or materials, including chemical compositions that function “usefully” according to U.S. Patent and Trademark Office definitions. Ideas, suggestions, and natural or physical processes may **not** be patented.¹⁴ There are no restrictions on exhibiting patented items. Once they are patented, anyone may purchase and display detailed drawings of a patent-protected invention from the U.S. Patent Office.¹⁵

Trademarks (common law, state, and federal law) are brand names, symbols/logos, and/or words used by businesses (including museums) to distinguish their products and services from their competitor’s products and services.

Trademarks can’t be used to stop competitors from selling or producing similar goods. Instead, trademarks “brand” or indicate the creator or manufacturer of the goods. Museums

most frequently use their names or buildings as trademarks, particularly for their shops, reproductions, and services. To function, trademarks do NOT have to be registered. However, once registered with the U.S. Patent and Trademark Office, manufacturers may list their trade name with a registration notice symbol (®). Current registration lasts for 10 years with optional renewal. Trademarks may be searched online at <<http://www.uspto.gov/tmdb/index.html>> When a trademark is used to “brand” a service, it is called a service mark. Materials with trade and service marks owned by others may be exhibited and cited by name in museum publications as long as it is clear that the museum is not the source of the goods or services associated with the mark.¹⁶

The closely related rights of privacy and publicity are sometimes seen as synonymous with intellectual property rights.

Privacy rights (5 USC 552a and state laws including Restatement [Second] of Torts 652A-652I) protect private living individuals by giving them the right to be left alone from intrusions into their private lives. Privacy rights give private living individuals the right to be free from unwanted disclosure of private, potentially embarrassing information (such as medical or psychiatric histories, personnel records, confidential lawyer-client or clergy-client discussions), or from statements that place the individual in a false or misleading light. Individuals are also protected from having their name, face, nude image, fingerprints, house, or private words used by another for gain. Privacy law protections are non-commercial rights that end with death. In other words, the dead have no right to privacy under U.S. law. **Note:** Private information may only be viewed or copied by permission of the individuals documented. All other access to private information on living private individuals is generally prohibited by law, whether for profit or not.

Museums frequently encounter privacy issues when they hold oral/video histories or ethnographic interviews (and transcripts) that lack signed permission forms from the interviewer and interviewee. Museums holding still photographs and moving images of identifiable private living individuals without model releases from the individuals shown may also face privacy difficulties.¹⁷

Publicity rights (state common or statutory law in almost half the states) protect celebrities and grant them the right to benefit from any

usage of their name, face, image, voice, or other aspects of their image for commercial gain. Publicity law protections are commercial rights which may extend after death of the celebrity. Museums most often encounter these issues when they use materials that document living or dead celebrities, such as oral and video histories and/or still or moving images to produce commercial products such as clothing, tote bags, posters, or similar items. To produce such items, a museum must have written authorization or license from the celebrity or the celebrity's estate. Such authorization is not necessary if the celebrity is a federal employee shown in the course of their official duties, such as a U.S. president.¹⁸

When do intellectual property rights affect museums?

Due to their roles as keepers, managers, users, and creators of material culture and specimens, museums deal with intellectual property rights on a daily basis. A few of the key museum encounters are described below.

Museums as Researchers. In their roles as researchers, museum staff use copyrighted materials, such as books and manuscripts, as they research exhibitions, publications, and object documentation. During the research process, care must be taken not to infringe copyrights by plagiarism, unwarranted copying, or other activities that don't fall into the "fair use" realm. To prevent future problems, all copies should be marked with the word "copy," with the source of the materials (institutional name), and with rights that were acquired with the copy, if any (for example, "Use for research only, no publishing permission was acquired"). Museums may use copyrighted, patented, and trademarked items as research sources, but not materials protected by privacy laws.

Museums as Collections Managers. As collections managers and registrars, museums must document the intellectual property rights of the collections they manage. Deeds of gift should state the status of the copyrights received. If the deed of gift says nothing, the museum does not have the copyrights. If the museum doesn't receive the copyrights, collections documentation should clearly specify how the museum and researchers may use the collections. Museum staff may seek and obtain/purchase a license from the copyright holder to use the work in protected ways, such as in a publication. Generally, copyright is held by the creator or his/her heirs for up to 70 years after the death of the creator.¹⁹ However, creators may

have sold or transferred rights or the rights may have been held by the creator's employer if the work was a "work for hire" done as part of employment responsibilities. If the donor didn't own the copyrights, the museum staff may wish to track down the copyright holder to obtain the right to use the materials for other than "fair use" purposes.

Once the copyright holder(s) are discovered, the museum may

- request the gift of all copyright either now or in the creator's will, **or**
- purchase all copyrights, **or**
- purchase (license) just one or two of the copyrights (such as the right to copy and to publish), **or**
- request a license to use the materials for a particular project or program.

Museums as Rights Managers. If the museum owns the copyrights, the museum must enforce them or lose them. Copyright management involves using the materials with a proper copyright notice (©, the name of the copyright holder, and the date), and notifying users how and when to use protected materials. If wrongful use is discovered by the copyright holder, the holder is responsible for notifying the user that such usage must stop. If the unauthorized usage doesn't stop, the copyright holder must pursue a legal judgment against the user. Museums must be careful to always use their own trademarks correctly or risk losing them. Museums rarely hold or manage patents. Watch for materials that contain the images, words, fingerprints, and names of living private individuals and treat these materials as restricted. Materials protected by privacy restrictions must not be made available until the documented individual either authorizes use in writing or the individual(s) documented are dead.

Museums as Providers of Access and 2- and 3-D Reproductions to Researchers. As holders of heritage objects, museums provide access to their non-restricted holdings through copies, exhibits, study centers, web sites, and publications. Materials protected by privacy restrictions must not be made available until the documented individual either authorizes use in writing or the individual(s) documented are dead. Researchers and publishers should be alerted to the intellectual property status of materials they are interested in using and asked to sign a usage agreement stipulating how they will use the materials. Museums must not grant permissions for which they lack

the corresponding rights. If the museum lacks the copyrights to an item, it must grant only fair use copies for purposes of scholarship, parody, criticism, and news reporting, not for public distribution, publication, reproduction, performance, exhibition, or the production of derivative works such as tote bags or posters.

Museums as Publishers and Exhibit

Preparators. As publishers of exhibit catalogs and exhibit preparators, museums must obtain permissions from holders of intellectual property rights, such as creators of objects or their heirs. The copyright law does allow museums to exhibit the works they own and one copy, even if the museum does not own the copyrights. However, the museum may not copy and put the work in other exhibits, or send it to multiple workstations over a local area network, or transmit it over the Web unless the additional exhibit is judged to be a fair usage.²⁰ Privacy- and publicity-protected materials should not be used in exhibitions without permissions; although patented and trademarked items may be used.

Museums as Sponsors and Venues for Performing Arts Activities. As institutions that sponsor performing arts concerts and performances, museums must ensure that no pirated works are being performed that are covered by protections.

Museums as Contracting Parties. Museums frequently use the services of contractors, volunteers, and cooperators to conduct research, prepare exhibits and publications, and assist with special project work. In some cases such assistance can cause tricky intellectual property rights situations, as they may not have the same legal status as works of employees. For example, works created by federal employees during the normal course of doing business are **not** protected by copyright (although they may be protected by privacy and publicity laws). Contractors, cooperators, and volunteers may own the copyrights to works they created while working for the government depending upon what their contract, or other written agreement states. Only contracts that state that a work is a “work for hire” or that clearly spells out in writing that the museum receives all copyrights ensure that the museum obtains the copyrights.

Summary

As museums provide access to their collections, museum staff must become more active managers of the intellectual property rights to these collections. Without responsible rights man-

agement, museums face a wide range of legal risks from lawsuits to significant damage to donor and public relations. Responsible rights management increasingly forms a key element in the curatorial skill set, as it does for archivists and librarians.

Notes

- 1 The U.S. Constitution Art. I Sect 8, cl.8 reads, “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”
- 2 For a good overview on how copyright affects society see Michael S. Shapiro, “Not control, Progress,” on the AAM web site at <<http://www.aam-us.org/des.htm>>.
- 3 For a good overview of how this balancing act has been managed by museums, see Stephen E. Weil, “Not Money, Control” on the AAM web site at <<http://www.aam-us.org/des.htm>>.
- 4 See Christine Steiner, *A Museum Guide to Copyright and Trademark*. Washington, DC: AAM, 1999; and Marie C. Malaro, *A Legal Primer on Managing Museum Collections*. 2nd ed. Washington, DC: Smithsonian Institution Press, 1998. Also see Goldstein, Paul. Copyright. 2nd ed. Boston: Little, Brown, 1996.
- 5 Patricia McClung and Christie Stephenson, eds., *Images Online: Perspectives on the Museum Education Site Licensing Project*. Los Angeles: The J. Paul Getty Trust, 1998.
- 6 Laura N. Gassaway and Sarah K. Wiant, *Libraries and Copyright: A Guide to Copyright Law in the 1990s*. Washington, DC: Special Libraries Association, 1994.
- 7 See the Rights and Reproductions Information Network (RARIN) of the AAM Registrar’s Committee at <<http://www.panix.com/~squigle/rarin/01rcsite.html>>.
- 8 See Rebecca A. Buck and Jean Gilmore, eds., *The New Museum Registration Methods*. 4th ed. Washington, DC: American Association of Museums, 1998, and National Park Service, *Museum Handbook*, Part II, Museum Records, Chapters 2, Accessioning and 3, Cataloging. Washington, DC: Government Printing Office 1984.
- 9 U.S. Constitution, op cit.
- 10 Christine Steiner, ed. op cit. 32-33.
- 11 See also the Copyright Law of the United States of America at the Copyright Office of the Library of Congress at <lcweb.loc.gov/copyright/title17/#top> and *Copyright Crash Course* of the University of Texas at <<http://www.utsystem.edu/ogc/intellectual-property/cprtindx.htm>> and the Coalition for Networked Information Copyright Forum at <www.cni.org/Hforums/cni-copyright>.
- 12 Guidance on Fair Use for museums may be found in Christine Steiner, “The Double Edged Sword: Museums and the Fair Use Doctrine” published initially in “Museums and Fair Use” *Museum News* 76, No. 5 (September/October 1997), also currently on the AAM web site at <<http://www.aam-us.org/>>

des.htm>. Also see the Conference on Fair Use (CONFU) at <<http://www.uspto.gov/web/offices/dcom/oliaconfu/>>.

- 13 Also see William F. Patry, *The Fair Use Privilege in Copyright Law*. 2nd ed. Washington, DC: Bureau of National Affairs Books, 1995 and Melville B. Nimmer and David Nimmer, *Nimmer on Copyright*. New York: Matthew Bender & Co., 1998.
- 14 See the web site of the U.S. Patent and Trademark Office at <<http://www.uspto.gov/>>.
- 15 U.S. Constitution, op cit.
- 16 See also J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*. 4th ed., Eagan, MN: West Group, 1999, and International Trademark Association at <www.inta.org/>.
- 17 _____. *The Rights of Publicity and Privacy*. Eagan, MN: West Group, 1999, and MacNeil, Heather. *Without Consent: The Ethics of Disclosing Personal*

Information. Methchen, N.J.: Scarecrow Press, Inc., 1992.

18 *ibid.*

19 See the chart in the online version of this *CRM* issue for the term of copyright protection for various published and unpublished materials.

20 Christine Steiner, ed., op cit.

Diane Vogt-O'Connor is Senior Archivist, Museum Management Program, National Park Service, Washington, DC.

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See the "Intellectual Property Rights Action Chart," *CRM Online* at <<http://www.cr.nps.gov/crm/>>.

POW Photos Donated to Andersonville National Historic Site

Andersonville National Historic Site exists to preserve and interpret the history of American prisoners of War. Our work brings us in close contact with men and women who experienced captivity, from World War II to the present. The park has had a formal partnership with the American Ex-Prisoners of War since 1984, and this relationship was instrumental to the planning, construction, and opening of the National Prisoner of War Museum in April 1998. These former POWs are a source of artifact donations, oral histories, volunteer POW hosts, and often serve as advocates for the park. They are living sources of the history the park interprets.

Angelo Spinelli, an Army Signal Corps photographer taken prisoner in North Africa, took over 400 photographs secretly of Stalag III-B and Stalag III-A in February 1943. Upon arrival at Stalag III-B, he traded eight packs of cigarettes for a Bessa Voightlander camera, and proceeded to document, in complete secrecy and at great personal risk, life as a POW of the Germans. Andersonville's Chief Ranger, Fred Sanchez, made contact with Mr. Spinelli and established a relationship, which included conducting an oral history of his experience for the park's oral history collection.

To celebrate Former Prisoner of War Recognition Day and the second anniversary of the opening of the National Prisoner of War Museum, Sanchez planned a temporary/traveling exhibit using 92 of Spinelli's photographs, most of which have never been published. On April 7, 2000, the park hosted a reception to debut the exhibit and honor Mr. Spinelli. However, the most important event to occur in the course of producing the exhibit was Mr. Spinelli's decision to donate the negatives, the two German cameras, and the tripod he used. There is no other single collection of artifacts that document life as a POW of the Germans like this one, which will become even more important once those who experienced captivity are gone. This priceless collection is one of the most significant additions to National Park Service cultural resources in recent years. It is also a perfect example of how a park, and ultimately the public, can benefit when the Park Service reaches out to other individuals and organizations devoted to the same history.

Eric Reinert

Curator

*Andersonville National Historic Site
Georgia*



A group of American POWs dividing their bread rations and preparing for a meal at Stalag 3-B in North Africa. Photo taken secretly by POW Angelo Spinelli. Andersonville National Historic Site (accession ANDE-699). Photo courtesy Andersonville National Historic Site, National Park Service.